Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-1236

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,

Petitioners,

V.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY, LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION, and TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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FRANK L. CARSON, LAWRENCE HATCHER,
and STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., t/a
THE AMERICAN TOBACCO COMPANY
LOCAL 182, TOBACCO WORKERS
INTERNATIONAL UNION, and
TOBACCO WORKERS INTERNATIONAL
UNION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Notwithstanding the statement of petitioners of the questions presented (Petitioners' Brief at 6, 7), the Court of Appeals for the Fourth Circuit rendered its decision in this case only on the question of whether an order refusing to enter a consent decree proposed by the parties to litigation brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., and 42 U.S.C. § 1981 is appealable under 28 U.S.C. § 1292(a)(1). Carson v. American Brands, Inc., 606 F.2d 420, 421.

The issues raised now by petitioners relating to the appealability of the order of the District Court under the "collateral order"

exception to 28 U.S.C. § 1291 and concerning the alleged abuse of discretion by the District Court were not decided by the Court of Appeals. They should not now be considered by this Court. Tacon v. Arizona, 410 U.S. 351 (1973); Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

STATEMENT OF THE CASE

Solely for the purpose of this Brief in Opposition, respondents accept the Statement of the Case presented in petitioners' brief with the exception noted above that the Court of Appeals did not decide the appealability of the District Court's order under the "collateral order" exception to 28 U.S.C. § 1291.

ARGUMENT

CERTIORARI SHOULD NOT BE GRANTED

I. This Action Does Not Present a "Case or Controversy" Within The Meaning of Article III of The United States Constitution

The District Court order from which the petitioners sought an appeal to the Court of Appeals for the Fourth Circuit is an order refusing to enter a consent decree which was presented to the District Court on April 1, 1977, by all parties to this litigation. As the District Court recognized, 446 F. Supp. at 782, the parties were not in an adversary posture with respect to the decree presented.

Surely if petitioners had the right to appeal the District Court's order refusing to enter the

consent decree, so did respondents. Had this occurred, this Court's decision in Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971), would be squarely on point and would require dismissal of the petition for the failure of this matter to fulfill the "case or controversy" requirements of Article III, § 2 of the United States Constitution. In Moore, both the appellant and the appellee took the position in this Court that the anti-busing statute at issue was constitutional thus requiring this Court to hold that the action presented no case or controversy.

This case presents essentially the same lack of adversity as did Moore, supra, and the same result is required, that is, dismissal of the

petition. The respondents are no less "losers" with respect to the June 1, 1977, order of the District Court than are petitioners. All parties approached the District Court with a proposed consent decree and all parties were denied the benefits and burdens of that decree. The petitioners elected to appeal that order; the respondents did not. Since the presentation of the proposed consent decree to the District Court, this has not been an adversary proceeding.

Subsequent to the September 14, 1979, decision of the Court of Appeals dismissing petitioners' appeal and its issuance of mandate on October 5, 1979, respondents filed a motion with the District Court on October 10, 1979, requesting that the Court establish a pre-trial conference

pursuant to Rule 16 of the Federal Rules of Civil Procedure for the purpose of establishing a trial date and considering such other matters as might aid in the disposition of the case. In that motion, which is found as an appendix to this brief, the respondents noted that they no longer consented to the entry of the proposed decree which had been presented on April 1, 1977, and that the matter was in a posture to be tried on the merits.

The consent decree which was presented to the District Court on April 1, 1977, and refused by it on June 1, 1977, provided, inter alia, that every current and future regular employee at the Richmond Leaf facility of American Brands, Inc. be credited, for competitive and benefit seniority

purposes, with actual time worked as a seasonal employee. This proposed decree was thus formulated by the parties and reviewed by the District Court without benefit of this Court's decisions in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and California Brewers Association v. Bryant, 48 U.S.L.W. 4156 (February 19, 1980).

Clearly, the state of the law in the seniority system area has taken on an entirely new form since the proposed decree was framed. Teamsters and California Brewers instruct that "[t]he propriety under § 703(h) of . . . parallel seniority tracks cannot be doubted," 48 U.S.L.W. at 4159, and that the separation of seniority tracks does not "derogate from the identification of the

provisions as a 'seniority system' under § 703(h)." Id.

The respondents' withdrawal of consent to the decree after the decision of the Court of Appeals and after Teamsters takes on even greater significance in light of California Brewers, for a challenge to the validity of separate seniority tracks forms precisely the heart of petitioners' complaint. The parties must remain free to either devise a new consent decree reflecting recent developments in the law, or else proceed to trial and determine the issue of liability under standards now in effect.

Under these circumstances, the questions presented in the petition are moot since respondents do not now consent to the entry of the

decree. See, United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975). The appealability of the District Court's order is purely academic. There is no longer a "live controversy" between parties having adverse interests. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

This court has always refused to decide moot cases on the general ground that the judgment of this Court could not be carried into effect when there is no "subject matter on which the judgment of the law can operate". See, e.g., Ex Parte Baez, 177 U.S. 378 (1900). Since a decision of the issues presented by the petitioners can have no operative effect in this litigation, the case is now moot and the petition should be dismissed.

II. There is No Conflict Among the Courts of Appeal on the Issue Presented by the Petition

Contrary to the arguments of petitioners, no reported cases have been found by respondents other than that of the Court of Appeals below which have ruled on the appealability under 28 U.S.C. § 1292(a)(1) of an order refusing to enter a consent decree in employment discrimination litigation.

Petitioners endeavor to create such a conflict by arguing that the Court of Appeals below noted that Seigal v. Merrick, 590 F.2d 35 (2nd Cir. 1978) and Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), cert. denied 401 U.S. 912 (1971) were in conflict and that its decision was in accord with Seigal. 606 F.2d at 423-24.

First of all, the Court of Appeals did not "specifically note" that its decision was in accord with Seigal. More importantly, however, is the fact that both of these cases, which involved the appealability of a refusal by the trial court to enter a consent judgment in stockholders' derivative suits, were decided only by applying the "collateral order doctrine" established by this Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). These circuit courts did not decide whether the trial courts' orders were ones "refusing injunctions" and thus appealable under 28 U.S.C. § 1292(a)(1), the issue in this case. In short, there have been no conflicting decisions identified by petitioners which this Court should

now rectify by a decision as to the appealability of the order in question under 28 U.S.C. § 1292(a)(1).

As noted elsewhere, the other questions presented by petitioners for review in this Court were either not presented to or not considered by the Court of Appeals below and are therefore not proper for consideration at this time by this Court. Tacon v. Arizona, supra, 410 U.S. 351 (1973).

III. The District Court's Order Refusing to Enter a Consent Decree is not Appealable Under 28 U.S.C. § 1292(a)(1)

Section 1292(a)(1) of Title 28, U.S. Code, provides, inter alia, that the ". . . courts of appeal shall have jurisdiction of appeals from: (1) interlocutory orders of the

district courts . . . refusing . . . injunctions . . . ." Though no reported case has been found in which a court of appeals was asked to review the refusal to enter a proposed consent decree in employment discrimination litigation, the recent case of Gardner v. Westinghouse Broadcasting Co., 437 U.S. 438 (1978) is persuasive authority that such orders are not appealable as denials of injunctions.

This Court held in Gardner that the denial of class certification in a case where the plaintiff was seeking broad injunctive relief was not appealable under 28 U.S.C. § 1292(a)(1). The Court reasoned that the order was not one of irreparable consequence, that it could be reviewed both before and after judgment, that it did not affect the merits of the

plaintiff's suit and that it did not pass upon the legal sufficiency of any of the claims for injunctive relief. Reliance was placed, in part, on an earlier case in which the Court reviewed the history surrounding the adoption of § 1292(a)(1) and which held that the statute was enacted ". . . to permit litigants to effectively challenge interlocutory orders of serious, perhaps irreparable, consequence." Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955).

As was true of the order sought to be appealed in Gardner, supra, the District Court's order in this case similarly has no serious or irreparable impact on the merits of petitioners' claims below for they retain the right to proceed to trial

on the merits without the loss of any of their claims for injunctive relief.

Petitioners argue that this Court's decisions have established six criteria to be used in deciding whether a particular interlocutory order is appealable under 28 U.S.C. § 1292(a)(1): The order must (1) be unconditional and entered before trial, (2) do more than direct the case to proceed to trial, (3) settle, tentatively or finally, some aspects of the merits of the claims, (4) pass on the legal sufficiency of the claims for injunctive relief, (5) have an irreparable effect, and (6) not be one which can be reviewed before and after final judgment. (Petitioners' Brief at 25-26).

Assuming the validity of this analysis, the petitioners' case fails to satisfy the requirements of their asserted test. As to the first criterion, while the District Court's order was entered before trial, it was not in any sense unconditional with respect to whether or not the parties could resolve this matter by presenting a new consent decree to the court which would be entered. In fact, in its opinion, the District Court invited the parties to attempt to settle " . . . their differences without a violation of the law and without violating the right of any class members . . ." and that, if such was done, the court would enter an appropriate order. 446 F. Supp. at 791. This express invitation negates a finding of an unconditional refusal

to enter a consent decree in this case.

Secondly, it is clear that the District Court's order did nothing more than direct that the parties either proceed to trial or make another attempt to propose a consent decree, if they so desired. The order cannot be read to have done more.

Thirdly, it is apparent that the order did not settle, either tentatively or finally, as argued by petitioners, any aspect of the merits of their claims for relief. The District Court merely held that the parties could not dispose of the litigation in the precise manner they had chosen, but rather would be required to resolve the case in a different way or proceed to a trial.

Petitioners' arguments notwithstanding, the District Court order did not pass upon the legal sufficiency of their claims for injunctive relief. If anything, the Court held that certain types of injunctive relief might not be appropriate for reasons stated in its opinion, but the District Court did not make any ruling that plaintiffs, if they prevailed in the litigation, would be entitled to no injunctive relief.

Petitioners make the argument on the fifth criterion that the refusal to enter the proposed consent decree works an irreparable harm on the parties "by forcing them to undergo an expensive, unwanted, and unwarranted, trial" (Petitioners' Brief at 28). As noted, after the

District Court's order was entered, the plaintiffs were free to proceed to a trial of their case on the merits just as they would have been expected to do had no consent decree been proposed to the District Court. Surely it is not irreparable harm to require one to try a case which he has voluntarily filed in accordance with the law and the Federal Rules of Civil Procedure. No court has ever held that it is an irreparable harm to require one to meet the burdens of proof required of plaintiffs in a civil action.

IV. The Collateral Order Doctrine Does Not Apply

Petitioners expressly represented to the Court of Appeals that the order they sought to reverse was not a "collateral order" within

the exception to the finality requirements of 28 U.S.C. 1291 established in Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. 541 (Appellants' Supplemental Memorandum at 2). Yet, in their petition to this Court, they argue strenuously both for the first time and in contradiction to their position below, that the District Court's order refusing the consent decree is an appealable collateral order. As expressed earlier, the Court should not consider arguments made for the first time here, particularly when they have been previously disavowed. In any event, the argument is without merit.

Though the District Court's order is clearly not final, this Court established an exception to the

finality rule in Cohen, supra, for those orders that finally determine rights collateral to those asserted in the main action which are too important to be denied review and too independent of the case itself to require the deferral of appellate consideration.

This Court recently dealt with the Cohen exception to finality in Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) in which the following requirements for an appealable collateral order were set forth:

> To come within the "small class" of decisions excepted from the final judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action,

> and be effectively unreviewable on appeal from a final judgment. 437 U.S. at 468.

As to the first requirement that the order "must conclusively determine a disputed question", the second circuit noted in Seigal v. Merrick, supra, that a rejection of a proposed settlement or consent decree is not in any way "final" except in the sense that "that particular settlement will never be revived." Id., 590 F.2d at 38. The order at issue in this case in no way makes a final determination of whether the case may be settled, but only rejects a particular proposal. Thus the collateral order doctrine is inapplicable in this case.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

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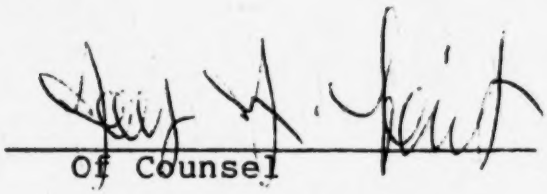
By 
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CERTIFICATE OF SERVICE

I certify that true copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to Napoleon B. Williams, Jr., Esquire, 10 Columbus Circle, Suite 2030, New York, New York 10019; Barry L. Goldstein, Esquire, 806 15th Street, N.W., Suite 940, Washington, D. C. 20005; and to Henry L. Marsh, III, Esquire, Hill, Tucker & Marsh, 214 East Clay Street, P. O. Box 27363, Richmond, Virginia 23261, counsel for petitioners, in accordance with Rule 33 of the Rules of the Supreme Court of the United States.

Jerry T. Wallace

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

FRANK L. CARSON, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 75-0553-R
AMERICAN BRANDS, INC., et al., Defendants.	)	

MOTION

The defendants American Brands, Inc., Local 182, Tobacco Workers International Union, and Tobacco Workers International Union, by their respective counsel, move the Court for an order establishing a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure directing the attorneys for the parties to appear to establish a trial date and to consider such other matters as may aid in the disposition of this action. In support of this motion the defendants assert that they do not now consent to the entry of the proposed Decree which was presented to the Court by the parties at the final pre-trial conference on April 1, 1977, and that the case is once again before this Court, the appeal by plaintiffs having been dismissed by the Court of Appeals for the Fourth Circuit on September 14, 1979, and the mandate having issued on October 5, 1979.

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I hereby certify that a true copy of the foregoing Motion was mailed to Henry L. Marsh, III, Esquire, Hill, Tucker & Marsh, 214 East Clay Street, P. O. Box 27363, Richmond, Virginia 23261, this 12 day of October, 1979.

_____